

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

GARY AND SUSAN CARLSON,

Plaintiffs,

v.

AMERICAN PACIFIC MORTGAGE
CORPORATION, a California corporation, and
JOHN DOES I-IV,

Defendants.

Case No. 2:14-cv-01141 RSM

ORDER GRANTING PLAINTIFFS'
MOTION TO COMPEL

This matter comes before the Court pursuant to Motion to Extend Deadlines (Dkt. # 19) and Motion to Extend Pretrial Deadlines (Dkt. # 25) by Defendant American Pacific Mortgage Corporation (“APMC”), as well as Motion to Modify Case Scheduling Order (Dkt. # 27), Second Motion to Compel Responses to Requests for Production (Dkt. # 31), and Third Motion to Compel Responses to Requests for Production (Dkt. # 40) by Plaintiffs Gary and Susan Carlson (the “Carlsons”). The parties suggested a telephonic hearing on the motions to extend, which the Court deems unnecessary. Having considered the parties’ briefs and supporting exhibits, as well as the relevant remainder of the record, the Court finds and rules on the pending motions as follows.

BACKGROUND

Plaintiffs commenced this civil action on April 3, 2014 by filing a Complaint in King County Superior Court, which Defendant APMC removed to this Court on the basis of its federal question jurisdiction. *See* Dkt. # 1. Plaintiffs, former APMC executives, asserted that

1 their respective employment agreements entitled them to bonuses based upon profitability,
 2 that APMC kept improper financial records, and that APMC wrongfully terminated Plaintiffs'
 3 employment when they inquired about unpaid bonuses in violation of 12 U.S.C. § 5567. Dkt.
 4 # 1-1 ("Compl."). Defendants counterclaimed for overpayment of wages, trade defamation,
 5 and breach of fiduciary duty/duty of loyalty, seeking an award of over \$1,000,000 in
 6 damages. *See* Dkt. # 3; Dkt. # 8, Ex. 1 ("Evans Decl.") ¶ 5.

7 On January 30, 2015, the Court entered an Order on Plaintiff's first motion to compel,
 8 directing APMC to produce responsive documents within thirty days and to pay Plaintiffs'
 9 reasonable expenses associated with bringing its motion. Dkt. # 16. Shortly prior to this
 10 deadline, Defendant filed the instant request to extend the deadline for production of these
 11 documents by at least 60 days in light of the substantial volume of responsive material
 12 (approximately 137,000 pages of documents). Dkt. # 19. This request was followed by two
 13 additional motions to modify the case scheduling order, one by Plaintiffs and one by
 14 Defendant, proposing different deadlines for production of expert reports, discovery cutoff,
 15 and discovery-related motions. Dkt. ## 25, 27. Finally, Plaintiffs filed two related motions to
 16 compel detailed below. Dkt. ## 31, 40.

17 The instant Order resolves all pending Motions.

18 DISCUSSION

19 A. Motions to Extend Deadlines

20 The Court first considers Defendant's request for a 60-day extension until May 2,
 21 2015 to produce documents responsive to Plaintiffs' Requests for Production ("RFPs") No.'s
 22 7 through 33. A Court's scheduling order may be modified under Federal Rule of Civil
 23 Procedure 16(b) "upon a showing of good cause." *Johnson v. Mammoth Recreations, Inc.*,
 24 975 F.2d 604, 609 (9th Cir. 1992). The district court may modify the pre-trial schedule if it
 25 cannot reasonably be met despite the diligence of the party seeking the extension. *Id.* The
 26 Court finds these standards met with respect to APMC's request for a continuance, in light of
 the substantial volume of responsive material and APMC's good faith efforts to comply with

1 the Court-ordered deadline. The Court further finds that Plaintiffs will not be prejudiced by
2 the extension, particularly in light of the continuance of discovery-related deadlines outlined
3 below. Accordingly, APMC's request to continue the deadline to respond to RFP's 7 through
4 33 shall be granted.

5 Plaintiffs and Defendant have both moved for additional modifications to the Court's
6 Scheduling Order. *See* Dkt. ## 25, 27. First, both parties agree that an extension of the
7 deadline for disclosure of expert reports is necessary, as the parties have been unable to agree
8 on the production of certain financial documents that would likely be considered by the
9 experts. The parties disagree solely on the scope of the extension. Plaintiffs assert that the
10 extension should not apply to APMC, which did not timely disclose an expert. Plaintiffs also
11 ask that the expert report disclosure deadline be extended to May 29, 2015, rather than April
12 27, 2015 as suggested by APMC, to allow the experts time to assimilate the financial data that
APMC anticipates it will disclose by the end of April. *See* Dkt. # 26, ¶ 9 (Chappel Decl.).

13 The Court agrees with Defendant that the deadline should be moved with respect to
14 both disclosure of the identity of experts and the experts' reports. As Federal Rule of Civil
15 Procedure 26(a)(2) explicitly contemplates both the disclosure of expert identities and reports
16 by the Court-ordered deadline, the Court finds no reason to parse this deadline in the way that
17 Plaintiffs request. In light of the Court's decision herein to extend the deadline for
18 Defendant's disclosures and its decision on Plaintiffs' requests to compel, the Court finds it
19 appropriate to extend the deadline for expert witness disclosures to May 29, 2015, as
20 suggested by Plaintiffs. The Court notes that the Federal Rules allow for supplementation
21 such that no further extension of this deadline should be necessary. *See* Fed. R. Civ. P.
22 26(a)(2)(E); Fed. R. Civ. P. 26(e).

23 As to discovery, both parties agree on an extension of the discovery-related motions
24 deadline from April 13, 2015 to May 28, 2015 but disagree as to an extension of the deadline
25 for the cutoff of discovery itself, currently set for May 11, 2015. Plaintiffs request an
26 extension solely for expert witnesses' depositions (*see* Dkt. # 28, pp. 2-3), while Defendant

1 asserts that the substantial volume of production contemplated coupled with the exigencies of
2 its contemporaneous audit period necessitate an extension of the discovery period in its
3 entirety. The Court agrees with APMC, particularly in light of its decisions herein on
4 Plaintiffs' requests to compel, and shall accordingly move the discovery period cutoff to June
5 25, 2015. As Defendant represents, this extension should not delay the trial date for this case.
6 In light of this extension, the Court finds it appropriate to also extend the dispositive motions
7 deadline to July 25, 2015, thirty days after the close of discovery. *See* Fed. R. Civ. P. 56(b).

8 **B. Motions to Compel**

9 Through their Second Motion to Compel Discovery Responses, Plaintiffs move the
10 Court to compel APMC to produce documents in response to RFP No.'s 6 and 7. Through
11 RFP No. 7, Plaintiffs seek production of documents reflecting the sale of retail loans opened
12 during Plaintiffs' employment with APMC, including those related to bulk sales and service
13 release premiums. Defendant asserts that the requested documents related to APMC's sale of
14 retail loans on the secondary market are irrelevant, as the profits that APMC may have made
15 in the capital or secondary market would not have been used as a basis for the calculation of
16 Plaintiffs' bonuses. Defendant also asserts that RFP No. 6, which seeks production of
17 documents reflecting bonus calculations for any APMC Washington employee, is overbroad,
18 in that it would require production of documents related to fixed bonuses, signing bonuses,
19 and other bonuses unrelated to the performance-based bonuses to which Plaintiffs assert they
20 were contractually entitled.

21 Plaintiffs' Third Motion to Compel Discovery Responses moves the Court to compel
22 disclosure of retail loan related documents for loans closed on after the termination of
23 Plaintiffs' employment (RFP No.'s 1 and 2), which Plaintiffs contend are relevant to their
24 compensation for lost wages should their employment termination be found wrongful. APMC
25 objects to this request on the same relevancy ground asserted in response to RFP No. 7.
26 Plaintiffs also seek an order compelling APMC to identify specific documents among those
already disclosed that are responsive to Plaintiffs' request for emails among APMC
employees regarding the Carlsons' employment performance and termination (RFP No.'s 3-
6). Defendant contends that it has already produced responsive documents as they were kept

1 in the ordinary course of business and therefore has no further disclosure obligations related
2 to these RFPs.

3 The Federal Rules of Civil Procedure provide for broad discovery in civil actions.
4 *Wilkerson v. Vollans Auto., Inc.*, 2009 WL 1373678, *1 (W.D. Wash. 2009). “Parties may
5 obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or
6 defense.” Fed. R. Civ. P. 26(b)(1). The provision is liberally construed to allow the wide-
7 ranging discovery necessary to avoid surprise at trial and help the parties evaluate and resolve
8 their disputes. *Wilkerson*, 2009 WL 1373678 at *1. For purposes of discovery, relevant
9 information is that which is “reasonably calculated to lead to the discovery of admissible
10 evidence.” *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005). The
11 party that resists discovery has the burden to show why the discovery request should be
12 denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). In considering such
13 disputes, the district court enjoys broad discretion in determining relevancy and must temper
14 discovery where its burden or expense outweighs its likely benefit. Fed. R. Civ. P.
15 26(b)(2)(C)(iii); *Hallet v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

16 First, as to RFP No.’s 1, 2, and 7, the Court finds that the relevancy dispute between
17 the parties goes to the merits of Plaintiffs’ claims and is inappropriate for resolution through
18 these discovery-related motions. It is undisputed that Plaintiffs were entitled to the “net
19 profits” generated by their retail division during the term of their employment. *See* Dkt. ## 36,
20 Ex.’s A & B. The question is whether these “profits” extend only to loans originated at the
21 branch level, or whether they include revenue derived from the sale of these loans on the
22 secondary market. *Compare* Dkt. # 36, ¶ 4 (Lowman Decl.) *with* Dkt. # 38-6, ¶¶ 3-4 (Van
23 Drunen Decl.). While the Court declines to rule on this matter at present, it notes that the
24 inclusion of service release premiums on APMC’s branch profitability statements suggests
25 that APMC itself understood revenues from the resale of loans to be relevant to the
26 calculation of branch income. *See* Dkt. ## 38 at Ex. A-D; Van Drunen Decl. at ¶ 3 (“ ‘Service
Release Premium’ is an industry term that reflects the income recognized by APMC from
APMC’s release to a third party of the right to service the loan, or in other words, to collect
the mortgage payments made by the borrower, typically effected with a sale of the loan to
investors on the secondary market.”). In light of the broad construction to be given to the

1 Federal Rules governing discovery, the Court finds the documents requested through RFP No.
2 7 to be sufficiently relevant to Plaintiffs' claims to warrant disclosure. As APMC does not
3 dispute Plaintiffs' contention that branch revenue information following their termination is
4 relevant to the Carlsons' potential recovery for lost wages, Plaintiffs' request to compel
5 responses to RFP No.'s 1 and 2 shall be granted as well.

6 As to Plaintiffs' additional requests to compel, the Court agrees with Defendant that
7 Plaintiffs seek too much. Plaintiffs' RFP No. 6 seeks extensive disclosure of APMC
8 documents pertaining to all employee bonuses without any tailoring to the type of bonuses to
9 which Plaintiffs were contractually entitled. The Court does not see how information related
10 to signing and fixed bonuses, for instance, has any bearing on the calculation of performance-
11 based bonuses allegedly owing to the Carlsons. Accordingly, Plaintiffs' request to compel
12 documents in response to RFP No. 6 shall be denied without prejudice. The Court is also not
13 persuaded that APMC has failed to respond to RFP No.'s 3 through 6 as required by the
14 Federal Rules. A party meets its disclosure obligations by producing "documents as they are
15 kept in the usual course of business." Fed. R. Civ. P. 34(b)(2)(E). It appears that Defendant
16 has done so by disclosing in excess of 50,000 pages of documentation taken from computers
17 used by the Carlsons during their APMC employment. Dkt. # 40-1, ¶ 5 (Evans Decl.).
18 Plaintiffs point to no requirement that Defendant pull out and identify directly responsive
19 documents from among those that have already been provided as they were kept in the
20 ordinary course of business. Accordingly, Plaintiffs' request to compel identification of
21 responsive documents to RFP's 3 through 6 shall also be denied.

22 Finally, the Court considers Plaintiffs' request for fees. Generally, if the Court grants a
23 discovery motion, it "must, after giving an opportunity to be heard, require the party or
24 deponent whose conduct necessitated the motion, the party or attorney advising that conduct,
25 or both to pay the movant's reasonable expenses incurred in making the motion, including
26 attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). Such an award is mandatory unless the Court
finds that the opposing party's nondisclosure was substantially justified or that other
circumstances make an award of expenses unjust. Here, the Court has granted Plaintiffs'
requests to compel only in part. As to the portions of these requests that it has granted, the
Court finds that Defendant's objections to RFP No.'s 1 and 7 were substantially justified

1 given Defendant's position on the merits. Accordingly, attorney's fees for Plaintiff's second
 2 and third motions to compel shall be denied. The parties are encouraged to resolve to the
 3 extent possible any future discovery disputes without the Court's intervention and with an eye
 4 to the broad discovery permitted under the Federal Rules.

5 **CONCLUSION**

6 For the above-stated reasons, the Court hereby finds and ORDERS on pending
 7 Motions as follows:

- 8 (1) Defendant's Motion to Extend Deadlines (Dkt. # 19) is GRANTED. APMC is
 9 permitted a sixty (60) day extension until May 2, 2015 to produce documents
 10 responsive to Plaintiffs' Request for Production No.'s 7 through 33.
- 11 (2) Defendant's Motion to Extend Pretrial Deadlines (Dkt. # 25) and Plaintiff's Motion to
 12 Modify Case Scheduling Order (Dkt. # 27) are both GRANTED in part. Deadlines in
 13 the Court's Scheduling Order shall be modified as follows, with trial date and all other
 14 pretrial deadlines remaining unmodified:
 - 15 a. The deadline for Disclosure of Expert Reports is continued to May 29, 2015.
 - 16 b. The deadline for Discovery-Related Motions is continued to May 28, 2015.
 - 17 c. The Discovery Cutoff is continued to June 25, 2015.
 - 18 d. The Dispositive Motions Deadline is continued to July 25, 2015.
- 19 (3) Plaintiffs' Second Motion to Compel Responses to Requests for Production (Dkt. #
 20 31) is GRANTED IN PART. Defendant is directed to produce all documents
 21 responsive to Plaintiffs' RFP No. 7, as provided herein. Plaintiffs' request to compel
 22 responses to its RFP No. 6 is denied without prejudice.
- 23 (4) Plaintiffs' Third Motion to Compel Responses to Requests for Production (Dkt. # 40)
 24 is GRANTED IN PART. Defendant is directed to produce all documents responsive to
 25 Plaintiffs' RFP No.'s 1 and 2, as provided herein. Plaintiffs' request to compel APMC
 26 to identify responsive documents to Plaintiffs' RFP No.'s 3 through 6 is denied.
- (5) No attorneys' fees or costs associated with bringing the above-specified motions shall
 be awarded.

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1 Dated this 24th day of April 2015.

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3 RICARDO S. MARTINEZ
4 UNITED STATES DISTRICT JUDGE
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